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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF COCHISE

DAVID WELCH, individually and on behalf of ALL CITIZENS OF COCHISE COUNTY, PRECINCT FIVE,

Petitioner,

v.

COCHISE COUNTY BOARD OF SUPERVISORS, PATRICK G. CALL, ANN ENGLISH, AND PEGGY JUDD,

Respondents.

Case No. CV201900060

RESPONDENTS' MOTION TO DISMISS RE: LACK OF STANDING AND FAILURE TO STATE A CLAIM

(Assigned to the Hon. Monica Stauffer)

(Oral Argument/Hearing Set April 11, 2019 at 9:30 a.m.)

Pursuant to Ariz.R.Civ.P. 12(b)(1)&(6), Respondents Cochise County Board of Supervisors, Patrick G. Call, Ann English, and Peggy Judd, through counsel, submit their Motion to Dismiss Petitioner's First Amended Special Action and Petition for Writ of Mandamus, Petition for Injunctive and Declaratory Relief, Petition for Removal of Board of Supervisors from Office (the "Amended Special Action"). Respondents request dismissal due to Petitioner's lack of standing, and his failure to state claims upon which the relief requested may be granted.

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I. FACTS MATERIAL TO THE ISSUES.[1]

A. Petitioner's Limited Facts Related To Standing.

Petitioner's alleged relationship to this matter is limited to residing within the geographical boundaries of Justice Court Precinct Five ("JP5"), and once having a pending trial in JP5 - prior to the Amended Special Action being filed. (Amended Special Action, ¶ 1). Indeed, on March 1, 2019, Petitioner's JP5 case was dismissed; and by a Justice of the Peace other than Justice of the Peace Call. (Exhibit A hereto).

B. Facts Regarding Supervisor Call's Appointment To The JP5 Vacancy.

On or about February 10, 2019,[2] the Cochise County Board of Supervisors (the "BOS") learned the Justice of the Peace for JP5, Tim Dickerson, would be resigning from his position to assume another judicial post within the county, and, in response, published a special meeting and possible executive session. (Amended Special Action, ¶¶ 9-11). The published agenda for the special meeting included two action items: 1) Discussion regarding the process for filling the vacancy for Justice of the Peace in Justice Precinct 5; and 2) Appoint _____ as Justice of the Peace for Justice Precinct Five. (Amended Special Action, ¶¶ 9-11, Exhibit 1 thereto). The agenda also noticed a possible executive session pursuant to A.R.S. § 38-431.03(A)(1) for "the discussion or consideration of appointment of a public officer, appointee or employee of the public body." (Amended Special Action, Exhibit 1 thereto). The "Information" piece of the agenda

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[1] Respondents' factual recitation from the Amended Special Action excludes conclusions, arguments, and legal propositions. *See Aldabbagh v. Arizona Dept. of Liquor Licenses and Control,* 162 Ariz. 415, 417, 783 P.2d 1207, 1209 (App. 1989) ("When testing a motion to dismiss for failure to state a claim, well-pleaded material allegations of the complaint are taken as admitted, but conclusions of law or unwarranted deductions of fact are not."). Otherwise, the facts in the Amended Special Action, and its attached Exhibits, are recited herein, whether Respondents agree with them, or not.

[2] The actual posting was February 8, 2019.

provided "Background" which included a statement that "[w]ith the recent appointment of Justice of the Peace Tim Dickerson in Justice Precinct 5 to the Cochise County Superior Court by Governor Ducey, the Board of Supervisors shall appoint a person from that precinct to serve as justice of the peace," noting the obligation of the BOS under A.R.S. § 16-230 to fill the vacancy, and the requirements of the selected appointee to be at least 18 years old, an Arizona resident, a qualified voter in JP5, with the ability to read and write English, and that the position need not be filled by an attorney. (Amended Special Action, Exhibit 1 thereto). The special meeting was scheduled to commence on Tuesday, February 12, 2019 at 9:30 a.m. at the BOS Executive Conference Room. (Amended Special Action, Exhibit 1 thereto).

During the Special Meeting held on February 12, 2019 starting at 9:30 a.m., there was a public discussion about the process to fill the impending Justice of the Peace vacancy in JP5 until the November 2020 election, including a discussion of A.R.S. § 16-230 which governs the process and criteria for filling the vacancy.[3] (Amended Special Action, ¶¶ 18, 20-22; Exhibit 2 thereto). That discussion included the discretion of the Board to take applications, or to make a direct appointment, and that a quick process was preferable due to the timing of the vacancy and the possible disruption to the operations of JP5. (*Id.*). Chairman Judd voiced disagreement with taking applications due to the lengthening of the process, but offered that one precinct judge had discussed forming a committee. (*Id.*). Supervisor English noted that a legal background was not a criteria and that she wanted to fill the vacancy with a person who would comply with the position's duties until the voters could decide the next election. (*Id.*). She did not want an application process, and noted the Board would not be bound by a committee's recommendations.

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[3] The Board of Supervisors' statutory obligation to "[f]ill by appointment all vacancies occurring in county or precinct offices" is contained in A.R.S. § 11-251(16). The process for the appointment is contained in A.R.S. § 16-230(A)(2).

(*Id.*). Supervisor Call agreed that accepting applications would be a lengthy process and if a committee were assembled, and the Board disagreed with the committee's recommendations, it would be disappointing to those involved. (*Id.*). County Administrator Ed Gilligan recommended a simple, direct appointment, offering several operational reasons including the current timeline, preserving continuing operations, and selecting a person with familiarity with court processes, proven public service, and ethical bearing. (*Id.*).

An executive session was approved, and held pursuant to A.R.S. § 38-431.03(A)(1); beginning at 9:47 a.m. and ending at 10:14 a.m. (Amended Special Action, ¶¶ 24, 26, Exhibit 2 thereto). The BOS has neither published nor posted the minutes of the executive session. (*Id.*). The special meeting item was tabled until 11:30 a.m. that morning, but due to the Board's attendance at a regular meeting and work session, the BOS did not reconvene for the special meeting until 12:31 p.m. that same day. (Amended Special Action, ¶¶ 27-28, Exhibit 2 thereto).

Upon reconvening in open session, Supervisor English moved to appoint Supervisor Call as the Justice of the Peace, JP5, with Supervisor Judd seconding the motion. (Amended Special Action, ¶¶ 29, 31-32, Exhibit 2 thereto). The effective date of the appointment was March 1, 2019. (Amended Special Action, Exhibit 2 thereto). Supervisor English explained that, over the years, Supervisor Call had expressed an interest in the position and she thought he would be a good fit. (Amended Special Action, ¶ 33, Exhibit 2 thereto). Chairman Judd commented that, although she was not aware of Supervisor Call's interest, she thought he was a good choice, especially with her knowledge of the confidence voters in the area placed in Supervisor Call. (Amended Special Action, Exhibit 2 thereto). Supervisor English further noted that due to the timing and required training for the appointee, she did not think an application process would be the most beneficial decision, that the position did not require a law degree or legal experience, and that voters would be given an opportunity to make their voices heard at the 2020 general election. (*Id.*). Chairman Judd agreed with Supervisor English, and was comfortable foregoing an application process. (*Id.*).

Chairman Judd called for a vote, which approved Supervisor Call's appointment by a 2-0-1 vote, with Supervisor Call abstaining. (Amended Special Action, ¶ 38, Exhibit 2 thereto). The BOS did not seek other candidates, or open the position up to a bidding process, prior to appointing Supervisor Call as Justice of the Peace. (Amended Special Action, ¶ 37).

Two days later, on February 14, 2019, Petitioner filed his original Special Action and Petition for Writ of Mandamus, Petition for Injunctive and Declaratory Relief. (Amended Special Action, ¶ 37). When the BOS published an agenda item to ratify the appointment of Call, Petitioner successfully blocked the ratification meeting for a brief time. (Amended Special Action, ¶¶ 43, 46, Exhibits 4, 5 thereto). Nonetheless, on February 25, 2019, Presiding Judge Conlogue administered the oath of office to Pat Call, and Justice of the Peace Call began his duties on March 1, 2019. (Amended Special Action, ¶¶ 47-49).[4]

C. The BOS Ratification Of Call's Appointment.

On Sunday, March 10, 2019, the BOS published a notice and agenda stating its intent to hold an A.R.S. § 38-431.05 meeting ratifying the February 12, 2019 appointment of Pat Call as Justice of the Peace for JP5. (Exhibit B, hereto). The notice and agenda stated Call's status as an acting Board Supervisor during the February 12, 2019 session, and that he had abstained from the vote. (*Id.*). The notice, agenda, and information described the February 12, 2019 meeting, and directed the public to where, and how, they could obtain the minutes of that meeting. (*Id.*). The

[4] Petitioner's Amended Special Action goes on to allege that Justice of the Peace Call's decisions will be deemed null and void and his continued appointment will negatively affect the operations of JP5, and those appearing before it. (Amended Special Action, ¶¶ 52-56). Contrary to the allegations, because Justice of the Peace Call performs the duties of his office, and maintains the appearance of right to the office, his decisions, pursuant to the *de facto* officer doctrine, are not rendered null and void. *In re Estate of de Escandon*, 215 Ariz. 247, 250, 159 P.3d 557, 560 (App. 2007)

agenda and information also attached a copy of the February 12, 2019 minutes of the open session. (*Id.*).[5]

On Thursday, March 14, 2019, the noticed public meeting was held in which the BOS voted 2-0 to ratify the February 12, 2019 appointment of Supervisor Call to fill the vacancy of Justice of the Peace, with Supervisors Judd and English voting for ratification, and Supervisor Borer absent. (Exhibit C, hereto). Although three members of the public commented, Petitioner was not one of them, nor did he appear at the meeting. (*Id.*). Justice of the Peace Call was not present during the ratification meeting. (*Id.*).

II. PETITIONER LACKS STANDING TO SEEK RELIEF IN THIS MATTER.

A. Petitioner Does Not Have Standing To Seek Relief That Is In The Nature of *Quo Warranto*.

Petitioner seeks the disqualification, or removal, from public office of the Respondent Supervisors Judd and English, and Justice of the Peace Call, either directly or through some Court-imposed selection process. (Amended Special Action, ¶¶ 85-87; 102-104; 106; 113-114; 120-121; prayer for relief items 1-4, 6-9). Petitioner has no standing to pursue this form of relief. *Quo warranto* has been held to be the exclusive remedy for challenging a public office holder, or franchise. *See, Jennings v. West,* 194 Ariz. 314, 318-20 982 P.2d 274, 278-80 (1999); *Crouch v. City of Tucson,* 145 Ariz. 65, 67, 699 P.2d 1296, 1298 (App. 1984). Whatever label Petitioner uses, a challenge to an office holder's title is an action in *quo warranto*. *State ex rel. Sawyer v. LaSota,* 119 Ariz. 253, 255, 580 P.2d 714, 716 (1978) (although the holder of an

[5] A.R.S. Sec. 38-431.03 requires the minutes of the executive session to remain confidential.

office may be compelled to perform the duties of that office, *quo warranto*, and not mandamus, is the available remedy to challenge title to the office).[6]

The controlling statutes regarding actions in *quo warranto* are found at A.R.S. §§ 12-2401, *et. seq*., and provide that an action testing the qualifications, and removal, of an official can be maintained only by the attorney general, A.R.S. §12-2401; the county attorney, A.R.S. §12-2402; or a person claiming a present entitlement to the office or franchise. A.R.S. §12-2403; *see also, State ex rel. Sawyer v. LaSota*, 119 Ariz. at 255, 580 P.2d at 716 (1978) ("[b]y the express provisions of the statute a private party can only bring quo warranto when he, himself, claims the office or franchise in question."); *Tracy v. Dixon*, 119 Ariz. 165, 166, 579 P.2d 1388, 1389 (1978) ("[o]ne who seeks the aid of a court to be inducted into an office must show a present right."). As to the latter provision, the person claiming entitlement to the office or franchise, must first have sought attorney general or county attorney action pursuant to A.R.S. §12-2401 or -2402. *See*, A.R.S. § 12-2043(A). Even then, notice of the application must be provided to the attorney general or county attorney. A.R.S. § 12-2043(B). A challenge to the qualifications, and removal, of a public official from his or her office cannot be brought by any other class of plaintiff or petitioner. *See, Jennings*, 194 Ariz. at 318-20 982 P.2d at 278-80 (1999) (also providing an extensive history of *quo warranto* to challenge the holders of public office).

This matter is controlled by the Arizona Court of Appeals, Division 2, decision in *Crouch.* There, the claimant challenged the City of Tucson's letting of a commercial franchise to Mountain States Telephone and Telegraph Company without submitting the franchise to the

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[6] There is no cause of action for "Petition For Removal of Board of Supervisors From Office," that is separate from *quo warranto*. While certain statutes, such as A.R.S. 38-431.07, might serve as a basis for removal, the action to obtain the removal would still be one of *quo warranto* under A.R.S. §§ 12-2401, *et. seq.*

electorate of the City of Tucson in violation of the Arizona Const. Art. 13, §4 and A.R.S. § 9-501. *Crouch*, 145 Ariz. at 66, 699 P.2d at 1297. Crouch, like Petitioner here, alleged no particular status in relation to the alleged franchise nor did he allege he was affected more than the citizenry at large. *Id.* The court held that "[w]here a party, such as appellant, asserts a general interest, his challenge must be through a complaint to the attorney general or county attorney that the franchise is held illegally. In such instance, the attorney general or county attorney '... shall bring the action [in quo warranto] when he has reason to believe that any such office or franchise is being ... unlawfully ... exercised.'" *Crouch*, 145 Ariz. at 67, 699 P.2d at 1298; *see also Rural/Metro Fire Dep't, Inc. v. Pima Cty.*, 122 Ariz. 554, 556, 596 P.2d 389, 391 (App. 1979) (private citizen has no standing to bring claim for relief that can only be had through *quo warranto*).

Petitioner is neither the attorney general, county attorney, nor a person alleged to have a present right to hold the positions of County Supervisor or Justice of the Peace. Any and all portions of Counts I-V, and the Petitioner's prayer for relief, seeking that Respondents be removed from office, either directly or through some court-imposed process, or that they not be paid for their services, is an action in *quo warranto* that Petitioner has no standing to maintain.

B. Petitioner Lacks Standing To Bring Claims For Declaratory Or Injunctive Relief.

"[T[he question of standing in Arizona is not a constitutional mandate since [Arizona courts] have no counterpart to the 'case or controversy' requirement of the federal constitution." *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Ariz.*, 148 Ariz. 1, 6, 712 P.2d 914, 919 (1985) (citing *State v. B Bar Enters.*, 133 Ariz. 99, 649 P.2d 978 (1982)). When addressing questions of standing, Arizona courts "are confronted only with questions of prudential or judicial restraint." *Id.* Nonetheless, the courts have established a

rigorous standing requirement; "[t]o gain standing to bring an action, a plaintiff must allege a distinct and palpable injury." *Sears v. Hull*, 192 Ariz. 65, 69, 961 P.2d 1013, 1017 (1998) (citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975)); *Fernandez v. Takata Seat Belts, Inc.*, 210 Ariz. 138, 140, 108 P.3d 917, 919 (2005). So, although not absolute, Arizona courts consistently have required that a party possess standing to maintain an action. *See Armory Park*, 148 Ariz. at 6, 712 P.2d at 919; *Alliance Marana v. Groseclose*, 191 Ariz. 287, 289, 955 P.2d 43, 45 (App.1997); *Dail v. City of Phoenix*, 128 Ariz. 199, 624 P.2d 877 (App. 1980) (affirming summary judgment against plaintiff because plaintiff did not have standing as a taxpayer or resident to challenge a municipal contract). The requirement is important: the presence of standing ensures the "issues will be fully developed by true adversaries," thereby assuring the courts "do not issue mere advisory opinions." *See, Armory Park*, 148 Ariz. at 6, 712 P.2d at 919; *Sears v. Hull*, 192 Ariz. at 71, 961 P.2d at 1019.

"To have standing to bring [a special action…] a plaintiff must allege 'particularized harm,' resulting from the decision." *Ctr. Bay Gardens, L.L.C. v. City of Tempe City Council*, 214 Ariz. 353, 358–59, 153 P.3d 374, 379–80 (App. 2007), *as amended* (Feb. 6, 2007), *citing*, *Blanchard v. Show Low Planning and Zoning Comm'n,* 196 Ariz. 114, 118, 993 P.2d 1078, 1082 (App. 1999). The plaintiff must have suffered an "injury in fact, economic or otherwise." *Aegis of Arizona v. Town of Marana*, 206 Ariz. 557, 562, 81 P.3d 1016, 1021 (App. 2004) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp,* 397 U.S. 150, 152 (1970)). Future injury that is only remotely possible, or based on sheer speculation, does to give rise to relief. *Klein v. Ronstadt*, 149 Ariz. 123, 124, 716 P.2d 1060, 1061 (App. 1986).

In his Amended Special Action, Petitioner makes no attempt to show distinct, palpable injury related to the BOS appointment of Justice of the Peace Call. When the original Petition was filed, Call had not assumed the duties of Justice of the Peace and, therefore, would not have made decisions on Petitioner's pending JP5 matter. By the time Call began his Justice of

the Peace duties, Petitioner's pending matter had been dismissed. Petitioner alleges no harm he expected to suffer from Call's appointment, even if his matter was still pending. Petitioner does not appear to have been present at the February 12, 2019 special meeting, or the March 14, 2019 ratification meeting. With no particularized harm resulting from Call's appointment, or any alleged or apparent personal interest, Petitioner lacks standing.

Nor does Petitioner's status as a taxpaying citizen suffice to establish standing. In *Tucson Community Development and Design Ctr., Inc. v. City of Tucson,* 131 Ariz. 454, 457-58, 641 P.2d 1298, 1300-01 (App. Div. 2, 1982), the court held that a taxpaying citizen with a "general desire to enforce the law," lacked legal standing to maintain a special action for injunctive or declaratory relief where a city mayor and council adopted a resolution to redevelop land, and subsequently purchased additional land, without first adopting a resolution finding the area is "slum or blighted and redevelopment is necessary in the public interest." *Id., citing* A.R.S. § 36-1473. The court relied on the Division One decision in *Dail v. City of Phoenix,* 128 Ariz. 199, 624 P.2d 877 (App. 1980) holding that citizen taxpayers lacked standing to seek declaratory or injunctive relief where the city had allegedly failed to meet several legal requirements when it purchased the Ahwatukee water system, where there was no showing funds raised by taxation were used, and the city suffered no pecuniary loss. Importantly, the *Tucson Community* court found that any tax monies the city had spent on public employees performing their duties in support of the activity the suit sought to proscribe, was insufficient to confer standing upon the citizen-taxpayer. 131 Ariz. at 458, 641 P.2d at 1302. Here, Petitioner's bare allegation that he was once a litigant in JP5 and is a citizen living within JP5's boundaries is insufficient to confer standing to bring a special action for declaratory or injunctive relief. Whatever funds the County spends toward a Justice of Peace for JP5 will be spent whether the position is filled by Justice of the Peace Call, or some other person.

Moreover, those funds will be spent to allow the public official to perform the duties of office; an expenditure that does not, itself, confer standing. *See, Tucson Community, id.*

Finally, an allegation of generalized harm that is shared alike by all or a large class of citizens is not sufficient to confer standing. *Sears v. Hull*, 192 Ariz. at 69, 961 P.2d at 1017 (1998), *citing Warth*, 422 U.S. at 499. Because a plaintiff who cannot allege a defendant inflicted a distinct and palpable injury on him cannot sue that defendant, *Hull*, 192 Ariz. at 69, 961 P.2d at 1017, "it logically follows that the same plaintiff should not be able to sue that defendant by bringing a class action purporting to represent a class of people who actually were harmed by the defendant." *Fernandez,* 210 Ariz. at 141, 108 P.3d at 920. "To permit a plaintiff to do that would severely weaken, if not entirely eliminate, our standing requirement." *Id.* "[N]amed plaintiffs in class actions 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'" *Fernandez, id., citing Warth,* 422 U.S. at 502; *see also Lewis v. Casey*, 518 U.S. 343, 357 (1996); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n. 20 (1976); *Allee v. Medrano*, 416 U.S. 802, 828–29 (1974). "[T]he proper inquiry in a class action lawsuit must initially focus on whether the plaintiff has an individual claim against the defendant. If she does not, she cannot maintain a class action against that defendant." *Fernandez, id.*

Although Petitioner styles his Amended Special Action as being on behalf of "All Citizens of Cochise County, Precinct Five," the allegation is of no legal relevance, as Petitioner has no standing to represent a larger group if he, himself, fails to allege an individual claim of distinct and palpable injury, or particularized harm. *Fernandez, id.* Petitioner's allegations that the "Citizens of Cochise County" may suffer harm are insufficient to demonstrate the standing needed to pursue the Amended Special Action. *Id.* Even then, Petitioner fails to allege a basis

for asserting representative capacity of the public at large, and this matter is not certified as a class action under Ariz.R.Civ.P. 23.

C. Petitioner Does Not Have A Beneficial Interest To Seek Mandamus And, Even If He Does, Lacks Standing Under The Legal Theories Supporting The Claim For Mandamus Relief.

To be sure, the *Tucson Community* court noted the standing requirement for declaratory and injunctive relief differs from, and is more demanding, than that required for a mandamus action. 131 Ariz. at 457, 641 P.2d 1301 ("[i]n an action for mandamus the taxpayer need not show an expenditure of tax funds or a pecuniary loss by the governmental body"). A.R.S. § 12-2021 allows for a mandamus action upon the "verified complaint of the party *beneficially interested*." The term "beneficially interested" for purposes of mandamus relief is viewed broadly. "If the petitioners, as members of the board, are in fact required by law to make a financial disclosure and have refused to do so, respondents, as members of the public for whose benefit the financial disclosure law was enacted, have standing to bring an action in the nature of mandamus to require disclosure." *Armer v. Superior Court of Arizona, In & For Pima Cty.*, 112 Ariz. 478, 480, 543 P.2d 1107, 1109 (1975).

For starters, without a *verified* Amended Special Action, mandamus relief must be refused. A.R.S. § 12-2021. Additionally, despite the breadth given to the term "beneficially interested," the legislature could have expressly stated in A.R.S. § 12-2021 that "any citizen" of Arizona has standing to bring a mandamus action.[7] The legislature does not use such expansive language in § 12-2021. Because "the Arizona legislature knows how to expressly grant a power …[when] [i]t has not done so … we can only conclude that its choice …was intentional." *Hounshell v. White,* 220 Ariz. 1, 6, 202 P.3d 466, 471 (App. Div. 2, 2008).

[7] In A.R.S. § 36-2818(A) the legislature did just that, providing standing to "any citizen" to seek mandamus for the failure to implement regulations under Arizona's Medical Marijuana Act.

Accordingly, there must then be some meaning to "beneficially interested" beyond mere taxpayer status. The *Armer* court answers that question, at least in some part, by stating the "financial disclosure" required by statute is for the benefit of all taxpaying citizens, providing standing to all taxpaying citizens. Here, Petitioner has alleged no business before JP5, no interest in who fills the vacancy, and is not even registered to vote in the next JP5 election. (Exhibit D, hereto). This is unlike the universal interest in government financial disclosure expressed in *Armer*. Without allegations showing Petitioner is "beneficially interested," he cannot claim standing.

Even if this Court assumes A.R.S. § 12-2021 standing has been sufficiently alleged, that is not the end of the inquiry. The statutory bases that Petitioner relies upon for mandamus require more. A.R.S. § 38-431.07(A), providing enforcement for alleged violations of open meeting laws, requires the petitioner to be a "person *affected* by [the] alleged violation of th[e] article." (emphasis added). A.R.S. § 38-506(B), providing enforcement for alleged conflict of interest statutes, requires the petitioner to be a "person *affected* by a decision of a public agency." (emphasis added). While Arizona law gives sparse insight into what it means to be "affected" by an alleged statutory violation or public agency decision, cases in which the claims are brought tend to show a direct, rather than theoretical, consequence suffered by the claimants. *See, e.g., Cooper v. Arizona Western College Dist. Governing Bd*., 125 Ariz. 463, 464, 610 P.2d 465, 466 (App., 1980) (former faculty members of Arizona Western College whose employment contracts were not renewed in a meeting allegedly held in violation of Arizona open meeting laws); *Karol v. Board of Ed. Trustees, Florence Unified School Dist. Number One of Pinal County*, 122 Ariz. 95, 96, 593 P.2d 649, 650 (1979) (probationary teachers whose contracts were not renewed in a meeting allegedly held in violation of open meeting laws). Here, Petitioner's Special Action contains no allegation, directly or by inference, to show he has been "affected" by the appointment of Call.

III. PETITIONER HAS FAILED TO STATE CLAIMS UPON WHICH RELIEF MAY BE GRANTED.

A. The BOS Ratification Of Supervisor Call's Appointment Moots Any Claim For Relief Based On An Alleged Open Meeting Law Violation.

A.R.S. § 38-431.05 provides the statutory mechanism, through ratification, to cure issues of open meeting law impropriety. Out of an abundance of caution, and in an effort to ensure any issue of open meeting law improprieties were resolved regardless of merit, the BOS set the March 14, 2019 ratification meeting, including a call for public comment.[8] A.R.S. § 38-431.05(A) provides that "[a]ll legal action transacted by any public body during a meeting held in violation of any provision of this article *is null and void except as provided in subsection B*." (emphasis added). A.R.S. § 38-431.05(B) provides that a public body may ratify action taken in violation of open meeting laws if 1) ratification takes place at a public meeting within 30 days of discovery of a violation; 2) the notice describes the action to be ratified and information on how the public can obtain a detailed description of the prior action; 3) the detailed written description is made available to the public and all deliberations, consultations, and decisions of the public body that preceded the prior action; and 4) the notice and detailed written description are published at least seventy-two hours in advance of the ratification meeting.

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[8] Respondents maintain there was no violation of open meeting laws. Sufficient, advance public notice of the February 12, 2019 meeting was provided in accordance with A.R.S. § 38-431.02(A)(2). The content of the notice, agenda, and information conformed with the requirements of A.R.S. § 38-431.02(G). The executive session was conducted for a purpose authorized under A.R.S. § 38-431.03(A)(1) and Petitioner's bald assertion that "legal action" occurred in executive session is insufficient to support a violation of A.R.S. § 38-431.03. To the extent the BOS deviated from the originally noticed schedule by tabling the item to later in the day because there were two other meetings to attend, at worst is a technical defect that does not render unlawful two public sessions held during normal business hours, and beginning as scheduled in the agenda. *Ahnert v. Sunnyside Unified Sch. Dist. No. 12*, 126 Ariz. 473, 475, 616 P.2d 933, 935 (App. 1980).

These requirements have all been met for the March 14, 2019 meeting. (*See*, Exhibits B and C hereto). The curative result of the A.R.S. § 38-431.05 meeting is not limited to any particular alleged open meeting law violation but, instead, revives the legal validity of all decisions made, reversing any alleged "null and void" effects. *See, Tanque Verde Unified School Dist. No. 13 of Pima County v. Bernini*, 206 Ariz. 200, 210, 76 P.3d 874, 884 (App. Div. 2, 2003) (ratification cured vote taken in executive session, and "[n]othing in the ratification statute requires a public body to repeat an entire process improperly conducted in executive session"). The ratification moots Petitioner's open meeting law claims.

B. The Appointment Of Supervisor Call Does Not Fall Within The Plain Language Of The Conflict Statutes Petitioner Relies Upon.

A.R.S. § 11-251(16) places a statutory duty on a County Board of Supervisors to "[f]ill by appointment all vacancies occurring in county or precinct offices." Justices of the peace are county officers for purposes of appointment. *See, e.g., Collins v. Corbin*, 160 Ariz. 165, 166, 771 P.2d 1380, 1381 (1989); *Nicol v. Superior Court,* 106 Ariz. 208, 473 P.2d 455 (1970). Otherwise, "[a] justice of the peace is definitely a constitutional officer." *Barrows v. Garvey*, 67 Ariz. 202, 205, 193 P.2d 913, 914 (1948).

A.R.S. § 16-230(A)(2) governs the process to fill a justice of the peace vacancy. "[T]he board of supervisors shall appoint a person of the same political party as the person vacating the office to fill the portion of the term until the next regular general election." *Id.* The elected justice of the peace position is for a four-year term, and state statute does not require any particular legal training or background to qualify for the position. A.R.S. § 22-111, *et. seq.*; *Massey v. Bayless*, 187 Ariz. 72, 74, 927 P.2d 338, 340 (1996) ("justices of the peace … are not required to be admitted to the practice of law"); *Crouch v. Justice of Peace Court of Sixth Precinct,* 7 Ariz. App. 460, 465, 440 P.2d 1000, 1005 (1968) ("[n]or do we find any other constitutional or statutory provision which requires a Justice of the Peace to be an

attorney"). Likewise, neither A.R.S. § 16-230, nor any other statute, mandates the BOS fill the vacancy by application, committee, or other particular selection process. In other words, the BOS acts with statutory authority in making a direct appointment. Once appointed, however, the provisions of the Arizona Constitution govern the judicial conduct of justices of the peace, *see*, A.R.S. Const. Art. 6.1, §§ 4, 5; *Matter of Lehman*, 168 Ariz. 174, 812 P.2d 992 (1991); and the BOS has no right to control the judicial activities of the appointed Justice. *Hernandez v. Maricopa County*, 138 Ariz. 143, 673 P.2d 341 (App. 1983); *Yamamoto v. Bd. of Supervisors*, 124 Ariz. 538, 606 P.2d 28 (App. 1980).

A.R.S. § 38-291, *et. seq*. covers issues of qualification and tenure of public officials, including defining vacancies and certain prohibitions on who may fill them. A.R.S. § 38-291, -294 includes, in its definition of "vacancy," a resignation of the incumbent. A.R.S. § 38-296 contemplates that a public official in one elective office may seek, or hold, a subsequent elective office, although resignation from the first may be required. The statutory provision is consistent with the common law doctrine of incompatibility of public offices where a public officer who accepts a second office which is incompatible with the first office automatically vacates the first office. *Perkins v. Manning*, 59 Ariz. 60, 122 P.2d 857 (1942). On the other hand, where two offices are compatible, *i.e.*, an elected county supervisor also serving as an appointed member of a board of regents, the same public official may hold both positions. 1980 Ariz. Op. Att'y Gen. 16 (1980). Indeed, A.R.S. § 38-291, *et. seq*. not only fails to prohibit an elected official from accepting an appointment to another public office, but recognizes that such appointments may, from time to time, be made and accepted.

Petitioner attempts to overcome this legislative recognition by refitting the facts into an alleged violation of public official anti-conflict statutes. The facts, however, don't fit.

Petitioner relies primarily on A.R.S. §§ 38-503, 504, and 509.[9] These statutes are dealt with, in turn, starting with A.R.S. § 38-503:

> **A.** Any public officer or employee of a public agency who has, or whose relative has, a substantial interest in any contract, sale, purchase or service to such public agency shall make known that interest in the official records of such public agency and shall refrain from voting upon or otherwise participating in any manner as an officer or employee in such contract, sale or purchase.
>
> **B.** Any public officer or employee who has, or whose relative has, a substantial interest in any decision of a public agency shall make known such interest in the official records of such public agency and shall refrain from participating in any manner as an officer or employee in such decision.

This statute, on its face, does not apply to a political appointment. Here, no voting Supervisor had a substantial interest in any contract, sale, purchase, or service to the public agency – the County, or its Board of Supervisors. Instead, the BOS was filling an elected judicial position vacancy; an independent, constitutional position that does not provide a "service" to the County, and whose duties the BOS does not control. Even if it could be claimed that A.R.S. § 38-503 applies to Supervisor Call, his role as a fellow Supervisor appears in the original and ratification agenda items, he refrained from voting in the initial decision to fill the vacancy, and made no appearance at the ratification meeting.

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[9] Petitioner also recites A.R.S. §§ 38-443, -447, and -510 which provide for criminal penalties based upon conduct that is not supported by Petitioner's allegations. To the extent these statutes are alleged to be a basis for a public official's removal, that remedy is in *quo warranto,* and because a conviction is required under the language of these statutes to support that penalty, a criminal conviction would also be required. *State ex rel. Smith v. Bohannan,* 101 Ariz. 520, 421 P.2d 877 (1966) ("… where the constitution or statute of a state provides that a public office is forfeited upon the conviction of a public official for a criminal offense, the conviction is a prerequisite to any proceeding to remove the officer. This is, of course, the rule in Arizona, as elsewhere").

That making a political appointment to an elected position vacancy is not a "contract, sale, purchase, or service" is made more clear by A.R.S. § 38-503(C), which provides that "no public officer or employee of a public agency shall supply to such public agency any equipment, material, supplies or services, unless pursuant to an award or contract let after public competitive bidding." Appointments to vacant county political offices are governed by A.R.S. § 16-230, not procurement rules governing competitive bidding for goods and services.

Petitioner's reliance on A.R.S. § 38-504(C) is also misplaced. It provides:

> A public officer or employee shall not use or attempt to use the officer's or employee's official position to secure any valuable thing or valuable benefit for the officer or employee that would not ordinarily accrue to the officer or employee in the performance of the officer's or employee's official duties if the thing or benefit is of such character as to manifest a substantial and improper influence on the officer or employee with respect to the officer's or employee's duties.

Supervisor Call abstained from the vote to fill his vacancy, and his appointment is not "of such character as to manifest a substantial and improper influence on the officer or employee with respect to the officer's or employee's duties" as a Supervisor. Indeed, by virtue of his appointment, and subsequent resignation, Call has ceased to perform the duties of a member of the Board of Supervisors.

Finally, A.R.S. § 38-509 provides that "[e]very political subdivision and public agency subject to this article shall maintain for public inspection in a special file all documents necessary to memorialize all disclosures of substantial interest made known pursuant to this article." The only interest the County has, related to filling the JP5 vacancy, is to ensure its statutory duties and obligations are executed. In this case, the selection of Supervisor Call for the JP5 vacancy did not require a § 38-509 disclosure as neither the BOS, nor its voting members Judd and English, had a personal, financial interest or stake in the selection other than ensuring that a person with the requisite statutory qualifications was selected.

C. Plaintiff Cannot Obtain *Quo Warranto* Relief In A Special Action.

Aside from the standing issues raised, Petitioner may not obtain *quo warranto* relief in the context of a special action. "Relief previously obtained against a body, officer, or person by writs of certiorari, mandamus, or prohibition in the trial or appellate courts shall be obtained in an action under this Rule …" AZ ST SPEC ACT R. 1. "The writ of quo warranto, A.R.S. §§ 12-2041 to 12-2045, is believed to be sufficiently different from the other three writs that it is not included here." AZ ST SPEC ACT R. 1, State Bar Committee Notes. Issues necessary to the resolution of a *quo warranto* action do not include any of the three enumerated questions allowable in a special action. AZ ST SPEC ACT R. 3.

D. This Court Should Decline Issuing Declaratory Or Injunctive Relief Upon The Purely Political Questions Raised In Petitioner's Amended Special Action.

Petitioner disagrees with the BOS decision to appoint Supervisor Call to the JP5 position, and to make the appointment without taking applications from other persons. It is equally true, however, that Petitioner offers no allegation that Supervisor Call was unqualified for, or otherwise disqualified from, the appointment; that an attorney must fill the position; or that the statutes dealing with vacancy and appointment of the public office require the selection procedure demanded. Petitioner's twisted interpretation of the conflict statutes does not morph this situation into one demanding a selection process, or criteria, different than that imposed by the state legislature. As a matter of analogy, "[i]n a continuous line of cases . . . it has been held that the Legislature has no power to add new or different qualifications for a public office other than those specified in the Constitution. *State ex rel. Sawyer v. LaSota*, 119 Ariz. at 256, 580 P.2d at 717. Thus, where the legislature attempted to assert an additional requirement to qualify for the position of State Attorney General, the court in *LaSota* held the "additional qualification [is] not required by the Constitution and is of no force or effect," and that a case based on such a proposition "[a]s a matter of law, [does] not state sufficient facts upon which

the Court can grant any relief." *Id.* Likewise, neither is a court "free *to craft a mandatory obligation* with which [it] can then compel" a Board to comply. *See, Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 466, 160 P.3d 1216, 1224 (App. 2007) (emphasis added).

This Court should decline the invitation to judicially override a political decision authorized, and even mandated, by the requirements of state statute, and for which the underlying basis was articulated in the course of two noticed, open sessions.

E. Petitioner Fails To State A Claim For Mandamus Relief.

"Mandamus is an extraordinary remedy issued by a court to compel a public officer to perform an act which the law specifically imposes as a duty." *Bd. of Educ. v. Scottsdale Educ. Ass'n*, 109 Ariz. 342, 344, 509 P.2d 612, 614 (1973); *State Bd. of Tech. Registration v. Bauer*, 84 Ariz. 237, 239–40, 326 P.2d 358, 360 (1958). It proceeds on the assumption that the applicant has an immediate and complete legal right to the thing demanded. *Id.* at 239–40, 326 P.2d at 360. Because a mandamus action is designed to compel performance of an act the law requires, "[t]he general rule is that if the action of a public officer is discretionary that discretion may not be controlled by mandamus." *Collins v. Krucker*, 56 Ariz. 6, 13, 104 P.2d 176, 179 (1940). "It has been held many times that the term 'mandamus' applies *only* to a proceeding brought to compel the performance of an act, and not to one to restrain action; mandamus is not a substitute for negative injunction." *Smoker v. Bolin*, 85 Ariz. 171, 173, 333 P.2d 977, 978 (1958) (emphasis in original). A mandamus action may only be brought if the statutory duty imposed on the public official or board is purely "ministerial." *El Paso Natural Gas Co. v. State*, 123 Ariz. 219, 221, 599 P.2d 175, 177 (1979). A ministerial duty is one that specifically describes the manner of performance and "leaves nothing to the discretion" of the public official or board. *Id.* Where an official has complied with the duty imposed by statute, no action for mandamus lies to perform a duty already completed. *Yes on Prop 200*, 215 Ariz. at 466, 160 P.3d at 1224.

The only non-discretionary task here was completed; namely, to appoint a qualified person to fill the vacancy left by Justice of the Peace Dickerson. *See*, A.R.S. § 16-230. Who the BOS should appoint was a matter of discretion. Although Petitioner may be disappointed in the selection, Supervisor Call is qualified under the law, was appointed during a vote in which he abstained, and resigned his position as Supervisor to take up the mantle of Justice of the Peace.

In reviewing Petitioner's specific prayer for relief (Amended Special Action, pgs. 17-19), there is nothing upon which mandamus may be granted. Prayer items 1-4, and 6-9 all seek *quo warranto* relief.[10] Even if items 3 and 4, regarding Justice of the Peace Call returning his pay or not receiving his pay, are not considered relief in *quo warranto*, there is certainly no ministerial, non-discretionary duty to perform the requested acts. Prayer item 5 is moot because this Court had the opportunity to enjoin the pending ratification proceeding, and correctly chose not to. In any event, enjoining action is not appropriate for mandamus. *Smoker, supra.* Prayer item 8 is moot because the ratification cured any issues related to alleged open meeting law violations, and because the BOS held its noticed ratification proceeding informing the public of its intent to ratify the appointment of Supervisor Pat Call. Those parts of prayer items 8 and 9 requiring the BOS to re-open the position to qualified candidates and create a selection committee, aside from seeking *quo warranto* relief, are not ministerial, non-discretionary acts but, instead, constitute issues of statutory interpretation and discretionary action that are not susceptible to mandamus relief.[11] *See, Yes on Prop 200, supra.* Items 11 and 12, aside from

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[10] Also requested as items of relief in Count II (Mandamus), paragraphs 102, 103, 106, and 107.

[11] Also requested as items of relief in Count II (Mandamus), paragraphs 103 and 104.

their relationship to mooted open meeting law issues, also seek to enjoin action, rather than compelling it, and are not appropriate issues for mandamus relief. *Smoker, supra.*

Prayer item 10,[12] disclosure of the February 12, 2019 executive session minutes is actually prohibited by law. First, the BOS had the statutory right to discuss the JP5 appointment in executive session. A.R.S. § 38-431.03(A)(1). Second, A.R.S. § 38-431.03(B) provides that "[m]inutes of and discussions made at executive sessions ***shall*** be kept confidential," with the limited exception of 1) the members of the public body that met, 2) officers, appointees or employees who were the subject of discussion, 3) the auditor general for an audit authorized by law, and 4) a county attorney or attorney general investigating an open meeting law violation. (emphasis added).

Notwithstanding that all open meeting issues are moot, Petitioner fits none of the four exceptions to confidentiality and, therefore, cannot be provided the minutes of the executive session.[13] Even when disclosure is authorized, A.R.S. § 38-431.03(F) provides the receiving parties must take appropriate action to limit further disclosure and to protect privileged information. A.R.S. § 38-431.03(B) and A.R.S. § 38-431.03(F), in tandem, make clear that Petitioner is not entitled to receipt of executive session minutes, and most certainly not through mandamus.

IV. CONCLUSION.

For all of the reasons cited above, Petitioner lacks standing to pursue relief in this matter and, even if standing exists for a portion of Petitioner's claims, he fails to state claims upon

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[12] Also requested as items of relief in Count II (Mandamus), paragraph 105.

[13] Public disclosure for purposes of an A.R.S. § 38-431.05 ratification proceedings is *not* one of the exceptions to statutory confidentiality.

which relief may be granted, as a matter of law. Accordingly, Respondents seek dismissal of Petitioner's Amended Special Action, with prejudice.

DATED this 22nd day of March, 2019.

JELLISON LAW OFFICES, PLLC

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James M. Jellison
Attorney for Respondents

ORIGINAL E-filed on March 22, 2019, using TurboCourt, and to the following registrants:

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